Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-5–02 OF 2014 (D)
RAUS SHARIF PCA, ZULKEFLI CJ, SURIYADI, HASAN LAH AND AZAHAR MOHAMED FCJJ
13 JANUARY 2015

Evidence — Burden of proof — Plaintiff asserted settlement agreement existed — Whether plaintiff's burden to prove existence of agreement unaffected by defendant's failure to call witnesses at trial or by consequent presumption that all evidence adduced by plaintiff was true — Whether contemporaneous documentary and other evidence showed no settlement agreement was concluded — Whether adverse inference against defendant for failing to call witnesses could not be invoked as plaintiff failed to prove its case on balance of probabilities — Whether defendant did not deliberately suppress or withhold material evidence — Whether defendant's failure to appeal against registrar's dismissal of its pre-trial application to strike out plaintiff's action on ground of limitation did not render limitation issue res judicata — Whether dealings between parties did not give rise to estoppel precluding defendant from relying upon defence of limitation

Limitation — Accrual of cause of action — Plaintiff sued defendant for wrongful termination of contract 30 years after event — Whether cause of action for termination of contract time barred — Whether 30 years of silence between parties interspersed with limited communication failed to prevent limitation period from setting in — Whether dealings between parties showed no admission of liability by defendant nor conduct or representation creating belief defence of limitation would not be relied upon nor was there evidence of fraudulent concealment — Whether plaintiff had itself to blame for failing to enforce its rights, if any, with promptitude

The appellant was contractually bound under two agreements ('the agreements') to, inter alia, fell a specified amount of timber in a logging concession area within a stipulated period of time. On the ground that condition was breached, the respondent terminated the agreements on 18 March 1975. The appellant denied the breach, challenged the validity of the termination and sought the assistance of the federal government to help resolve its dispute with the respondent. At a meeting on 17 June 1975 the parties agreed to explore the possibility of setting up a joint venture company to undertake the work the appellant was to have carried out under the agreements. Following the meeting, the appellant put forth proposals to the respondent as to how the proposed joint venture could be implemented but there was no

response from the latter. The appellant then suggested that the respondent pay it RM3.5m as goodwill as part of measures towards the formation of a joint venture company between the parties. The respondent paid the appellant the RM3.5m requested subject to the condition that any agreement between the parties as to the joint venture was without prejudice to the respondent's rights under the agreements. Written communication between the parties continued intermittently for another 20 years and in October 2004, the appellant sued the respondent for damages in the High Court based on two causes of action that the respondent's termination of the agreements was unlawful and that the respondent had breached a 'settlement agreement' between the parties. The respondent pleaded that the appellant's action was time barred; that the agreements were validly terminated and that there was no concluded settlement agreement between the parties. At the trial, the appellant called three witnesses but none were called by the respondent. The High Court consequently presumed the evidence adduced by the appellant to be true and held that the termination of the agreements was invalid; that the appellant's claim was not time barred as there were continuing negotiations between the parties until the filing of the action; that a 'settlement agreement' came into existence based on the minutes of the 17 June 1975 meeting but that that agreement was nullified by the fraudulent conduct of the respondent. The Court of Appeal ('COA') reversed the High Court's decision and held, inter alia, that the appellant's action was time-barred and that there was no legally enforceable 'settlement agreement' between the parties. In the instant appeal against the COA's decision, the appellant argued that: (a) the respondent had abandoned the defence of limitation when it did not appeal against the registrar's dismissal of its application before trial to strike out the appellant's action on the ground of limitation; (b) the issue of limitation was res judicata; (c) the respondent was estopped from relying on the defence of limitation because there were 'continuous negotiations' between the parties up until the filing of the action which encouraged the appellant to believe it did not have to pursue legal action with respect to the termination of the agreements; (d) as the respondent did not call any witnesses at the trial, the COA should not have reversed the findings of the trial court but instead adverse inference should have been invoked against the respondent on its failure to call witnesses and adduce evidence.

Held, dismissing the appeal:

(1) The appellant's claim was time barred having been filed on 8 October 2004. Time commenced to run for the purposes of the Limitation Act 1953 from 18 March 1975 (the date of termination of the agreements). The appellant should have filed its claim on or before 17 March 1981 to preclude the same from being defeated by the defence of limitation (see para 43).

(2) None of the correspondence between the parties up to 2004 demonstrated any form of admission of liability on the respondent's part and there was no negotiation that could be said to have bound the respondent in any way. Those letters only demonstrated disinterest and lack of commitment on the respondent's part. The respondent did not at any time either by way of representation or conduct unmistakably cause the appellant to believe it would not rely on the defence of limitation so long as settlement negotiations were ongoing. The Court of Appeal was rightly satisfied that s 29 of the Limitation Act 1953, relating to fraud, did not apply as there was nothing to show any indication, representation or conduct by the respondent that it would not rely on the defence of limitation during the negotiations in the 1970s and 1980s, nor anything to demonstrate there was any fraudulent concealment (see paras 39–40 & 42).

(3) The documents tendered at the trial showed there was no written communication between the parties for over ten years from 1977–1989. The appellant did not do anything during that period to enforce any rights arising from the termination of the agreements. The appellant further failed to do anything from 1989 until it sent a letter on 24 January 1995 and remained silent again from 1996 until 25 June 2002. The fact that limited negotiations took place before 1977 did not prevent limitation from continuing to run and expiring (see paras 38 & 42).

(4) The limitation issue was not at any stage abandoned by the respondent. The issue was raised and kept alive in the High Court and was argued by both sides in the Court of Appeal. The plea of res judicata with regard to the issue of limitation also failed. The registrar's decision in the interlocutory application was not finally determinative of the limitation issue and it was open to the High Court at full trial to review the issue based on the oral and documentary evidence presented. The dismissal of the application was also without reasons and it was not possible to ascertain with any exactness the point decided by the registrar (see paras 27 & 29).

(5) The evidence led by the appellant failed to establish the existence of a legally enforceable settlement agreement between the parties. The contemporaneous documentary evidence showed a lack of the requisite components of a binding contract between the parties and fortified the fact that the respondent was only considering the possibility of entering into a joint venture agreement and not that a formal agreement had been made. The meeting on 17 June 1975, which was held on a without-prejudice basis, was not based on the legal relationship arising from the termination of the agreements. The object of the meeting was 'merely to discuss the possibility of setting up a joint-venture'. The without-prejudice payment of RM3.5m was a gesture of goodwill from

the respondent for the development the appellant had undertaken in Kelantan and was a result of the mediation efforts of high-ranking political figures and was not related to the termination of the agreements or the execution of a settlement agreement (see paras 47–48, 50, 53, & 55).

(6) The respondent's election to call no evidence at the trial did not preclude the reversal of plainly wrong findings of the High Court by the Court of Appeal. Though no witnesses were called by the respondent and even if the appellant's evidence was unopposed and therefore presumed to be true, that did not automatically mean the evidence had satisfied the burden of proving the existence of the settlement agreement borne by the appellant, or mean the burden of proving on balance of probabilities no longer applied or that a case to answer was automatically made out. The evidence adduced by the appellant had to be sufficient to prove the existence of the settlement agreement. The appellant failed to discharge that burden. Given that the case was a 'document-heavy dispute', the Court of Appeal was entitled to make its decision based on the contemporaneous documentary evidence that was adduced. The Court of Appeal rightly took the approach of considering the documents and evidence adduced during the trial in totality. The trial court did not do so and ignored or failed to analyse and take into consideration the facts as a whole (see paras 34–33 & 57).

(7) The court could not detect any oblique motive on the respondent's part in not calling any witnesses. It was inappropriate to draw an adverse inference under s 114(g) of the Evidence Act 1950 as there was no deliberate withholding or suppression of evidence as all the relevant documents were in the appellant's possession. It was also inappropriate because the appellant did not prove its case on balance of probabilities. Furthermore, the question of adverse inference was not raised by either party during the trial and neither the trial court nor the court of Appeal made any finding on the point. It was misplaced for the appellant to introduce the argument of adverse inference at this late stage (see para 58).

[Bahasa Malaysia summary

Perayu secara kontraktual terikat di bawah dua perjanjian ('perjanjian tersebut') untuk, antara lain, menebang jumlah tertentu kayu balak di kawasan konsesi pembalakan dalam tempoh masa yang ditetapkan. Atas alasan bahawa syarat telah dilanggari, responden telah menamatkan perjanjian-perjanjian pada 18 Mac 1975. Perayu telah menafikan pelanggaran itu, telah mencabar kesahan penamatan itu dan meminta bantuan kerajaan persekutuan untuk membantu menyelesaikan pertikaiannya dengan responden. Dalam mesyuarat pada 17 Jun 1975 pihak-pihak bersetuju untuk meneroka kemungkinan menubuhkan syarikat usahasama bagi melaksanakan kerja yang perayu

sepatutnya telah dijalankan di bawah perjanjian-perjanjian itu. Berikutan mesyuarat itu, perayu telah mengemukakan cadangannya kepada responden berhubung bagaimana cadangan usahasama boleh dilaksanakan tetapi tiada jawapan daripada responden. Perayu kemudian mencadangkan supaya responden membayar kepadanya RM3.5 juta sebagai ihsan kepada sebahagian daripada langkah-langkah terhadap pembentukan syarikat usahasama antara pihak-pihak. Responden telah membayar perayu RM3.5 juta yang diminta tertakluk kepada syarat bahawa apa-apa perjanjian antara pihak-pihak berhubung usahasama adalah tanpa prejudis terhadap hak-hak responden di bawah perjanjian-perjanjian itu. Hubungan bertulis antara pihak-pihak berterusan secara bersela untuk 20 tahun lagi dan dalam bulan Oktober 2004, perayu telah menyaman responden untuk ganti rugi di Mahkamah Tinggi berdasarkan dua kausa tindakan–bahawa penamatan perjanjian-perjanjian responden adalah menyalahi undang-undang dan bahawa responden telah melanggar 'settlement agreement' antara pihak-pihak. Responden memplid bahawa tindakan perayu telah luput had masa; bahawa perjanjian-perjanjian itu telah ditamatkan secara sah dan bahawa tiada perjanjian penyelesaian yang dapat disimpulkan antara pihak-pihak. Semasa perbicaraan, perayu telah memanggil tiga saksi tetapi mereka tidak dipanggil oleh responden. Mahkamah Tinggi berikutan itu menganggap keterangan itu dikemukakan oleh perayu sebagai benar dan memutuskan bahawa penamatan perjanjian-perjanjian it tidak sah; bahawa tuntutan perayu tidak luput had masa kerana terdapat perundingan berterusan antara pihak-pihak sehingga pemfailan tindakan itu; bahawa suatu 'settlement agreement' wujud berdasarkan minit mesyuarat bertarikh 17 Jun 1975 tetapi bahawa perjanjian itu telah terbatal akibat kelakuan penipuan responden. Mahkamah Rayuan ('MR') telah mengakas keputusan Mahkamah Tinggi dan memutuskan, antara lain, bahawa tindakan perayu telah luput had masa dan tiada 'settlement agreement' yang boleh berkuat kuasa secara sah antara pihak-pihak. Dalam rayuan ini terhadap keputusan MR, perayu berhujah bahawa: (a) responden telah mengabaikan pembelaan had masa apabila ia tidak merayu terhadap penolakan pendaftar berhubung permohonannya sebelum perbicaraan untuk membatalkan tindakan perayu atas alasan had masa; (b) isu had masa adalah res judicata; (c) responden telah diestop daripada bergantung kepada pembelaan had masa kerana terdapat 'continuous negotiations' antara pihak-pihak sehingga pemfailan tindakan yang menggalakkan perayu untuk mempercayai ia tidak perlu meneruskan tindakan undang-undng berkenaan penamatan perjanjian-perjanjian itu; (d) oleh kerana responden tidak memanggil mana-mana saksi semasa perbicaraan, MR tidak patut mengakas penemuan mahkamah perbicaraan tetapi sebaliknya inferens bertentangan telah digunakan terhadap responden berhubung kegagalannya untuk memanggil saksi dan mengemukakan keterangan.

Diputuskan, menolak rayuan: A

(1) Tuntutan perayu telah luput had masa kerana telah difailkan pada 8 Oktober 2004. Masa telah bermula bagi tujuan Akta Had Masa 1953 dari 18 Mac 1975 (tarikh penamatan perjanjian). Perayu sepatutnya telah memfailkan tuntutannya pada atu sebelum 17 Mac 1981 untuk mengecualikan yang sama daripada dikalahkan oleh pembelaan had masa (lihat perenggan 43). B

(2) Tiada hubungan antara pihak-pihak sehingga 2003 yang menunjukkan apa-apa bentuk penerimaan liabiliti di pihak responden dan tiada rundingan boleh dikatakan telah mengikat responden dalam apa cara. Surat-surat tersebut hanya menunjukkan sikap tidak berminat dan tiada komitmen di pihak responden. Responden tidak pada bila-bila masa sama ada melalui representasi atau kelakuan memang jelas menyebabkan perayu mempercayai ia tidak akan bergantung kepada pembelaan had masa selagi rundingan penyelesaian masih berterusan. Mahkamah Rayuan adalah dengan wajar berpuas hati bahawa s 29 Akta Had Masa 1953, yang berkenaan fraud, tidak terpakai kerana tiada apa-apa yang menunjukkan petunjuk, representasi atau tindakan oleh responden bahawa ia tidak bergantung kepada pembelaan had masa semasa perundingan dalam tahun 1970an dan 1980an, mahu pun apa-apa untuk menunjukkan terdapat apa-apa penyembunyian secara fraud (lihat perenggan 39–40 & 42). C D E

(3) Dokumen-dokumen yang ditenderkan dalam perbicaraan menunjukkan tidak terdapat komunikasi bertulis antara pihak-pihak selama lebih sepuluh tahun dari 1977–1989. Perayu tidak berbuat apa-apa sepanjang tempoh tersebut untuk menguatkuasakan apa-apa hak yang timbul daripada penamatan perjanjian-perjanjian itu. Perayu selanjutnya gagal untuk berbuat apa-apa dari 1989 sehingga ia menghantar surat pada 24 Januari 1995 dan tidak berbuat apa-apa lagidari 1996 sehingga 25 Jun 2002. Fakta bahawa rundingan terhad berlaku sebelum 1977 tidak menghalang had masa dari berterusan dan luput (lihat perenggan 38 & 42). F G

(4) Isu had masa tidak pada mana-mana peringkat dibiarkan oleh responden. Isu itu telah ditimbulkan dan dibicarakan di Mahkamah Tinggi dan telah dihujahkan oleh kedua-dua pihak di Mahkamah Rayuan. Pli untuk res judicata berhubung isu had masa juga gagal. Keputusan pendaftar dalam permohonan interlokutori bukan penentu terakhir isu had masa dan ia adalah terbuka kepada Mahkamah Tinggi semasa perbicaraan penuh untuk mengkaji semula isu itu berdasarkan keterangan lisan dan dokumentar yang dikemukakan. Penolakan permohonan itu juga tanpa sebab dan tidak mungkindapat ditentukan dengan apa-apa ketepatan perkara yang diputuskan oleh pendaftar itu (ihat perenggan 27 & 29). H I

(5) Keterangan yang dikemukakan oleh perayu gagal membuktikan kewujudan perjanjian penyelesaian yang boleh dikuatkuasakan dengan sah antara pihak-pihak. Keterangan dokumentar semasa menunjukkan kekurangan komponen yang diperlukan untuk kontrak yang mengikat antara pihak-pihak dan memperkuatkan fakta bahawa responden hanya mempertimbangkan kebarangkalian memasuki satu perjanjian usahama dan bukan di mana satu perjanjian formal telah dibuat. Mesyuarat pada 17 Jun 1975, yang diadakan atas dasar tanpa prejudis, tidak berdasarkan hubungan sah yang timbul daripada penamatan perjanjian-perjanjian. Objektif mesyuarat itu adalah 'merely to discuss the possibility of setting up a joint-venture'. Bayaran tanpa prejudis sejumlah RM3.5 juta adalah tanda ihsan daripada responden untuk pembangunan yang telah dilakukan oleh perayu di Kelantan dan adalah akibat usaha pengantaraan tokoh politik berpangkat tinggi dan tiada kaitan dengan penamatan perjanjian-perjanjian atau pelaksanaan perjanjian penyelesaian (lihat perenggan 47–48, 50, 53, & 55).

(6) Pemilihan responden untuk tidak memanggil apa-apa bukti semasa perbicaraan itu tidak menghalang pembalikan penemuan salah yang jelas di Mahkamah Tinggi oleh Mahkamah Rayuan. Walaupun tiada saksi dipanggil oleh responden dan walaupun bukti perayu adalah tanpa bertanding dan dengan itu dianggap sebagai benar, itu tidak secara automatik bermakna keterangan itu telah memenuhi beban membuktikan kewujudan perjanjian penyelesaian yang ditanggung oleh perayu, atau bermakna beban membuktikan atas imbangan kebarangkalian tidak lagi digunakan atau supaya suatu kes untuk dijawab secara automatik disediakan. Bukti yang dikemukakan oleh perayu perlu mencukupi untuk membuktikan kewujudan perjanjian penyelesaian. Perayu gagal melepaskan beban itu. Memandangkan kes itu merupakan 'dokumen-berat pertikaian'. Mahkamah Rayuan berhak untuk membuat keputusan berdasarkan keterangan dokumentar yang semasa yang dikemukakan. Mahkamah Rayuan dengan betul telah mengambil pendekatan mempertimbangkan dokumen-dokumen dan keterangan yang dikemukakan semasa perbicaraan secara menyeluruh. Mahkamah semasa perbicaraan tidak berbuat demikian dan mengabaikan atau gagal untuk menganalisis dan mengambil kira fakta-fakta secara keseluruhan (lihat pereggan 34–33 dan 57).

(7) Mahkamah tidak dapat mengesan apa-apa motif serong di pihak responden yang tidak memanggil mana-mana saksi. Ia adalah sesuai untuk membuat inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 kerana tidak mempunyai penahanan dan penyembunyian bukti yang tidak sengaja kerana semua dokumen berkaitan adalah dalam milikan perayu. Ia juga tidak sesuai kerana perayu tidak membuktikan kesnya atas imbangan kebarangkalian. Tambahan pula, persoalan inferens bertentangan tidak dibangkitkan

oleh mana-mana pihak semasa perbicaraan dan mahkamah perbicaraan atau Mahkamah Rayuan tidak membuat apa-apa keputusan mengenai hal ini. Ia tidak kena pada tempatnya untuk perayu memperkenalkan hujah inferens bertentangan pada peringkat selewat ini (lihat perenggan 58).]

Notes

For cases on burden of proof in general, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 653–1032.

For cases on accrual of cause of action in general, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2174–2193.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another [2010] EWHC 86 (TCC), QBD (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90, HC (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Florence Bailes v Dr Ng Jit Leong [1983] 2 MLJ 175 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

J H Milner & Son v Percy Bilton Ltd [1966] 2 All ER 894, QBD (refd)

Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang [2006] 4 MLJ 656; [2006] 2 CLJ 1040, CA (refd)

Len Min Kong v United Malayan Banking Corp Bhd And Another Appeal [1998] 2 MLJ 478, CA (refd)

Low Kian Boon & Anor v PP [2010] 4 MLJ 425, FC (refd)

Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd And Other Appeals [2004] 4 MLJ 105, CA (refd)

Mariam bte Shaik Mohd Omar v Ong Chin Poh [1994] 3 MLJ 419, HC (refd)

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Munusamy v Public Prosecutor [1987] 1 MLJ 492, SC (refd)

Nicolene Ltd v Simmonds [1953] 1 All ER 822, CA (refd)

Ranbaxy (Malaysia) Sdn Bhd v EI Du Pont De Nemours And Co [2011] MLJU 1135; [2011] 1 AMCR 857, HC (refd)

Re Estate of Choong Lye Hin, Decd; Choong Gim Guan v Choong Gim Seong [1977] 1 MLJ 96, FC (refd)

Selvaraju a/l Ponniah lwn Suruhanjaya Perkhidmatan Awam, Malaysia dan satu lagi [2006] 2 MLJ 585, CA (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141, CA (refd)

Storey v Storey [1961] P 63, CA (refd)

Teh Swee Lip v Jademall Holdings Sdn Bhd [2013] 6 MLJ 32, CA (refd)
The Fordeco Nos 12 And 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10 [2000] 1 MLJ 449, FC (refd)
The Pacific Bank Bhd v Chan Peng Leong [1998] 2 MLJ 613, CA (refd)
Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Evidence Act 1953 s 114(g)
Limitation Act 1953 ss 6(1)(a), 29
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Appeal No D-01–34 of 2010 (Court of Appeal, Putrajaya)

Muhammad Shafee Abdullah (Harvinderjit Singh, Vasanthi Rasathurai, Richard Lee and Sarah Abishegam with him) (Shafee & Co) for the appellant.
Sulaiman Abdullah (Raja Ahmad Mohzanuddin Shah Raja Mohzan with him) (Fozi Zain) and Shahidani Abd Aziz @ Juned (Kelantan State Legal Advisor) for the respondent.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by Syarikat Kemajuan Timbermine Sdn Bhd (the plaintiff in the High Court) pursuant to leave of this court given on 22 January 2014 to appeal against the whole decision of the Court of Appeal on the following question of law:

> Where a defending party had elected not to call any evidence during trial, in deciding whether the claimant has met the burden of proof, can the appellate court reverse and substitute the factual findings of a Trial Court with findings based solely on a construction of the documentary evidence in a vacuum, where such construction is inconsistent with:
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> (a) the unchallenged oral testimony of the claimant's witness;
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> (b) abandonment of defences by the defending party; and/or
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> (c) adverse inferences to be drawn from the failure of the defending party to call any witnesses.

[2] It would be convenient to describe the parties in this judgment as they appear in the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

AN OVERVIEW OF THE DISPUTE

[3] The subject matter of the dispute between the parties revolved around a timber logging concession over 510,239 acres of land in the State of Kelantan for a period of thirty three years awarded to the plaintiff by Kerajaan Negeri Kelantan Darul Naim (the defendant in the High Court).

[4] The plaintiff brought an action in the High Court at Kota Bharu against the defendant for damages based on a wrongful termination of the timber logging concession agreements made between the plaintiff and the defendant.

[5] The High Court had on 30 December 2009 allowed the plaintiff's claim. The defendant appealed to the Court of Appeal and on 6 August 2012, the Court of Appeal set aside the High Court orders. Hence, this appeal to this court.

BACKGROUND FACTS

[6] The background facts of the case which led to the plaintiff's appeal to this court have been well set out in the judgment of the Court of Appeal. We will rely on them to a large extent and set them out in the following paragraphs in so far they are relevant to the issues which arise for decision in this appeal.

[7] Pursuant to an agreement in writing dated 20 July 1964 ('the principal agreement') made between the defendant and Timbermine Industrial Corp Ltd ('the company'), the defendant granted to the company, among others, the right to log and extract timber in accordance with the annual-extraction-quota in an area extending to 510,239 acres ('the specified area'). The following are, among others, the most important expressed terms of the principal agreement:

(a) that the defendant shall give full authority to the company or its subsidiary company, their servants, agents, workmen, and assigns to enter the specified area for a period of thirty three years from the date of the principal agreement;

(b) that the specified area forming part of the state land extended to 510,239 acres;

(c) that the company shall pay royalties to the defendant in the sum of RM2m by way of two instalments of RM1m each, the first instalment to be made upon the signing of the principal agreement;

(d) that the company was to give priority to logging in approximately 133,360 acres of the specified area consisting of jungle land which was required for land development by the defendant ('the development areas'). The working schedule for the clearance of the development areas

apart from being delineated in the principal agreement was to be fixed and agreed by the parties hereto from time to time provided that not less than 30,000 acres was to be cleared in the first six years from the date of the principal agreement with the remaining to be completed in the next seven years. The company was to log from the remaining specified area not less than 40,000 tons of timber per year after the first thirteen years of the signing of the principal agreement (cl 5(b));

(e) in the event the company fails to log 30,000 acres within the first six years or the remaining acreage of the development areas in the next seven years as stipulated in sub-cl 5(b) above, then, the defendant shall be entitled to terminate this principal agreement. The company shall not have any claim or compensation for anything suffered or done by the company (cl 5(b)(i)); and

(f) in the event of either party hereto failing to comply with the terms and conditions herein and no specific provisions have herein above been stipulated for the breach or non-compliance of such terms and conditions, the other party shall be entitled to terminate this principal agreement without prejudice to such party's right for damages for breach of contract but such right of termination shall not be exercised until the other party has served notice in writing on the defaulting party requesting such party to remedy the breach or non-compliance within six months of the date of such notice and the defaulting party continues or persists in such breach of non-compliance provided always that if during the continuance of this principal agreement by cause of civil commotion, war, enforcement of emergency regulation, floods or other acts of God it shall become impossible for either party hereto to perform their respective part of this principal agreement, neither party shall be entitled to terminate this principal agreement nor enforce any of its terms. On the determination of the cause aforesaid the performance of this principle agreement shall be resumed within reasonable time (cl 11(A)).

[8] Pursuant to the principal agreement, the company on 20 July 1964 paid the defendant the sum of RM1m being the first instalment. By way of a supplementary agreement dated 6 November 1964 ('the supplementary agreement'), the principal agreement was varied, among others, to reduce the specified area from 510,239 acres to 280,000. The supplementary agreement included the following provision:

> The State Government will agree to re-negotiate from time to time the provisions and stipulations contained in the whole of this sub-clause on the submission of feasibility reports by consultants (such consultants to be approved by the State Government) specialized in the extraction and processing of timber Provided Always that in the event of the Company setting up an integrated timber industry in the Specified Area, the State Government shall not exercise its right of

> termination under sub-clause (b)(1) hereinabove and shall grant the Company reasonable extension of time to log in those portions of the Development Areas which the State Government does not as yet require or is not ready to utilize or such portions as are subsequently found unsuitable for agricultural development so as not to disrupt the continuous flow of supply of timber to the factories and mills set up by the company in the Specified Area. (cl 6)

[9] It is not disputed between the plaintiff and the defendant that on or about 7 February 1970, the rights of the company under the principal and supplementary agreements were assigned to the plaintiff. Hereinafter we shall refer the principal and supplementary agreements collectively as 'the agreements'. The defendant acknowledged the assignment vide letter dated 12 September 1970 and agreed to treat the first instalment of RM1m paid by the company as payment made by the plaintiff.

[10] The dispute in present matter arose a few years later when the plaintiff failed to fulfil the minimum logging requirements in breach of certain clause of the agreements. By a letter dated 18 March 1975 the defendant terminated the agreements based on an alleged breach of cl 5(b)(i) of the agreements by the plaintiff for failing to log a specified target amount of timber within a stipulated period of time. The plaintiff in turn vide its solicitor's letter dated 21 April 1975 denied breaching the said provision and challenged the validity of the defendant's notice of termination.

[11] The plaintiff thereafter sought the assistance of the Federal Government to help resolve its discontent over the termination of the agreements. Subsequently a meeting was held on 17 June 1975 at the behest of the then Prime Minister to resolve the dispute and it was chaired by Tengku Ahmad Rithauddeen, the then Minister of Information and Special Functions. The meeting was attended, among others, by officers from the defendant, representatives of the plaintiff and also other officers from the Federal Government. What was decided at the meeting formed one of the contentious issues between the parties, about which more will be said at a later stage of this judgment. Suffice for us to say at this point that during the meeting, it was agreed that parties would explore the possibility of setting up a joint venture company to undertake the work originally to be undertaken by the plaintiff under the agreements.

[12] Following the meeting, the plaintiff in a without prejudice letter dated 16 October 1975 put forward its proposals as to how the existing assets of the plaintiff should be dealt with upon the formation of the joint venture company.

[13] As there was no positive response from the defendant to the plaintiff's letter of 16 October 1975, the plaintiff pursued its proposals through the then

Finance Minister of Malaysia, Tengku Razaleigh Hamzah. By its letter of 22 September 1976 addressed to Tengku Razaleigh Hamzah, the plaintiff sought payment of the sum of RM3.5m as goodwill; the formation of the joint venture; for the joint venture company to take over the assets belonging to the plaintiff and for the plaintiff to be awarded concession pending the formation of the joint venture company.

[14] The proposals contained in the plaintiff's letter of 22 September 1976 were communicated to the defendant by Tengku Razaleigh Hamzah vide his letter of 28 September 1976. Tengku Razaleigh Hamzah expressly stated that his letter was 'without prejudice' to whatever action had been taken by the plaintiff following the termination of the agreements.

[15] The defendant's response (letter dated 28 November 1976) to Tengku Razaleigh Hamzah's letter of 28 September 1976 was to effect payment of RM3.5m to the plaintiff subject to the following qualification:

> Suka juga dipertegaskan di sini bahawa persetujuan yang dibuat ini tidak memperasangkakan akan tindakan yang telah diambil oleh Kerajaan Negeri dan seterusnya juga bagi sebarang perkiraan yang akan dilakukan kemudian kelak terhadap usaha-usaha yang dirancangkan bagi pembangunan di kawasan ini.

[16] As we shall see later in the judgment there was written communication between the plaintiff and the defendant for over twenty years from 1976–2002.

[17] However, as it turned out, the plaintiff commenced the present action against the defendant by filing a writ of summons and the statement of claim on 10 October 2004.

[18] In the main, the plaintiff anchored its claim against the defendant on two causes of action. The first is the unlawful termination of the agreements by the defendant. The second claim was based on the defendant's breach of the settlement agreement which was reached between the parties. Therefore, the alternative plaintiff's cause of action against the defendant was for damages suffered by the plaintiff arising from the plaintiff's failure to set up the joint venture company pursuant to the terms of the settlement agreement.

[19] One of the defendant's pleaded defences was that the plaintiff's action was time barred. The defendant also pleaded that the agreements were validly terminated and that there was no settlement agreement reached between the parties as the matters were merely at the stage of discussions.

PROCEEDINGS AT THE HIGH COURT

[20] At the trial, the plaintiff called three witnesses. The defendant elected not to call any witness. As we have indicated earlier, the High Court allowed the plaintiff's claim and ruled, amongst others, as follows:

(a) as the plaintiff had elected not to call any witness, the evidence led by the plaintiff must be assumed to be true;

(b) the agreements were not validly terminated by the defendant;

(c) the plaintiff's claim was not time barred. There was continuing negotiations over the termination of the agreements until filing of the action;

(d) there existed a settlement agreement between the parties based on the minutes of the meeting of 17 June 1975. The settlement agreement was a new legally binding agreement entered between the parties;

(e) the defendant did not honour the settlement agreement after a lapse of twenty six years. The defendant had committed fraud by concealing the facts relating to the concession areas or specified area; and

(f) the settlement agreement was null and void.

[21] The High Court awarded the plaintiff the following reliefs:

(a) general damages of RM560,000,000 based on the loss of 30% of the profits that would have been generated by the joint venture company on a concession over the specified area;

(b) general damages of RM1,740,000 being the salaries the plaintiff paid to its workers from its own funds as a result of the non-formation of the joint venture company;

(c) special damages of RM13,600,000 being the value of the assets the plaintiff had expended on which was to be used by the joint venture company.

PROCEEDINGS AT THE COURT OF APPEAL

[22] The Court of Appeal reversed the decision of the High Court. The Court of Appeal, among others, held as follows:

(a) the defendant was not estopped from relying on the defence of limitation and that limitation had expired on 17 March 1981. The plaintiff action was time barred; and

(b) there was no legally enforceable settlement agreement in existence and that none of the evidence pointed to such an agreement having come into being.

[23] Before us, learned counsel for the plaintiff raised several grounds in support of the appeal. Nevertheless, we think the critical and primary issues which arose for determination in this appeal revolved around two issues. The first is whether the plaintiff's claim is time barred, and the second is whether there was a legally enforceable settlement agreement between the plaintiff and the defendant.

Whether the plaintiff's claim is time barred

[24] The Limitation Act 1953 ('the 1953 Act') stipulates and restricts the period during which an action may be brought to enforce a contractual right. The specific provision in the 1953 Act is s 6(1)(a) which provides that an action founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The point in issue is that according to the defendant, the plaintiff's cause of action accrued on the date of termination of the agreements, that is to say, on 18 March 1975 and that six years had long passed when the plaintiff filed this action in 2004.

(i) Whether limitation is sufficiently pleaded

[25] As a starting point, the significant point to note is that the defence of limitation was properly and sufficiently pleaded by the defendant in para 18 of its defence which reads:

> Defendan sekali lagi mengatakan bahawa tindakan Plaintif ini adalah dihalang oleh had masa dan Defendan berhak ke atas pembelaan tersebut di sisi undang-undang.

[26] Even though the 1953 Act was not mentioned by name in the defence, it would be sufficient, in our judgment, for the defendant to aver in the defence that the plaintiff's claim is time barred according to law (see *Re Estate of Choong Lye Hin, Decd; Choong Gim Guan v Choong Gim Seong* [1977] 1 MLJ 96 and *Mariam bte Shaik Mohd Omar v Ong Chin Poh* [1994] 3 MLJ 419).

(ii) Whether the defendant had abandoned the limitation defence

[27] It is relevant to note that the defendant had prior to the trial of the action applied to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980 on the ground that the claim was barred by limitation. However, the application was dismissed by the registrar of the High Court without giving reasons. The defendant did not appeal against this decision and opted to carry on with a full trial. Since there was no appeal from this decision,

the principal contention by the plaintiff's learned counsel is that this was a clear case of abandonment of the limitation defence by the defendant. We do not think so. Limitation issue was in actual fact a point of law taken up before the High Court as can be seen in the grounds of judgment where the learned High Court judge held that the action was not time barred because 'the Plaintiff continued to pursue the matter from the date of the purported termination with the Defendant to the date of purported Settlement Agreement and to the date of filing of this suit' and 'the Defendant did not appeal against the decision' of the registrar dismissing the application to strike out the plaintiff's writ of summons and statement of claim on ground of limitation of time. In our view, the limitation issue had been argued by both sides in the Court of Appeal and this issue had so been raised and kept alive by the High Court, thus was not at any stage abandoned as contended by learned counsel for the plaintiff.

(iii) Whether res judicata can apply

[28] This leads on to the question of whether the issue of limitation was res judicata for the reason that there was no appeal from the decision of the registrar in dismissing the defendant's application to strike out the claim on the ground that it was time barred. As a matter of general principle when a matter has been adjudged by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata (a matter adjudged) because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783). On this point, the Court of Appeal held:

> In our opinion, the fact that the application was refused does not necessarily imply that the application was refused because the appellant failed to prove the defence of limitation. It is conceivable that the application was refused because the learned registrar was of the opinion that there had to be a trial of the action before the court could determine whether the respondent's claim was defeated by limitation. Accordingly, for the defence of res judicata to avail the respondent, it is imperative that the court examines the judgment of the learned senior assistant registrar. In this case, the learned senior assistant registrar did not provide any grounds of judgment and the respondent is not contending before us that the learned senior assistant registrar had expressly ruled that the defence of limitation was not available to the appellant at the trial of the action. In these circumstances, in our judgment, the appellant is not precluded by the doctrine of res judicata from raising the defence of limitation.

[29] We agree with the above findings of the Court of Appeal. To which we will add that the decision of the registrar in the interlocutory application is not finally determinative of the limitation issue. It lacked the essential element of finality. The hearing and arguments during the interlocutory application stage

were not exhaustive for the final determination of the limitation issue. It is open to the High Court at the full trial to review the limitation issue based on the evidence, both oral and documentary, presented by the parties (see *Selvaraju a/l Ponniah lwn Suruhanjaya Perkhidmatan Awam, Malaysia dan satu lagi* [2006] 2 MLJ 585). The effect of the registrar's dismissal of the application for striking out was simply that at the interlocutory stage, based on the limited material then available, the defendant was not entitled to have the plaintiff's pleadings struck out on the ground of limitation (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 and *Florence Bailes v Dr Ng Jit Leong* [1983] 2 MLJ 175). What is more, as we have said earlier, the application for striking out was dismissed by the registrar without providing any reasons. It is therefore not possible to ascertain with any exactness the point decided by the registrar. That is why res judicata cannot apply because to constitute a res judicata, the earlier judgment must necessarily and with precision determine the point in issue (see *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613). We agree with the submission of learned counsel for the defendant that in the circumstances of the present case the plea of res judicata should not prevail. We therefore hold that the defendant is not precluded from raising the defence of limitation.

(iv) Whether the defendant is estopped from relying on the defence of limitation

[30] Learned counsel for the plaintiff argued that the defendant was estopped from relying on the defence of limitation in respect of the unlawful termination of the agreements as the defendant had induced the plaintiff to forbear from commencing court proceedings. He added that the defendant was estopped from raising the defence of limitation by reason that there were continuous negotiations between the parties on the termination of the agreements up until the filing of the present action and that the defendant had encouraged the plaintiff to believe that it did not have to pursue legal remedies to enforce the agreements. Relying on the case of *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141, learned counsel argued that the defendant was estopped from relying on the statute of limitation for otherwise, the statute of limitation would be used as 'an engine of fraud'.

[31] On the other hand, learned counsel for the defendant argued that it was plain from the evidence adduced by the plaintiff at trial that there were long periods of silence, for example from 1977 to the mid-late 1980's, and inactivity from the plaintiff wherein limitation had expired and the plaintiff was seen to have abandoned any claim it might have had.

[32] On the 'continuous negotiations' point raised by the plaintiff, the Court of Appeal made the following important findings:

> Finally, on the issue of the applicability of s 29 of the Limitation Act, we are satisfied on an examination of the correspondence exchanged between the parties following the termination notice that the appellant did not at any time either by way of representation or conduct unequivocally cause the respondent to believe that the appellant would not rely on the defence of limitation so long as settlement negotiations were ongoing. On the contrary, we are satisfied that it was the respondent who was pursuing negotiations with little or no positive interest on the part of the appellant in the direction of settlement and the offer to not pursue legal proceedings against the appellant originated from the respondent of its own volition. It is also our considered view that the allegation of the respondent that the commencement of time to compute the defence of limitation should be postponed because of a fraud perpetrated by the appellant is nothing but a red herring.

[33] Based on the evidence produced by the plaintiff, it was entirely reasonable and right for the Court of Appeal to conclude that limitation had lapsed and that the learned High Court judge was plainly wrong in holding otherwise. The Court of Appeal rightly took the approach of considering the documents and evidence adduced during the trial in totality; the learned High Court judge did not do so and ignored or failed to analyse and take into consideration the facts as a whole.

[34] As aptly described by learned counsel for the defendant, this commercial case involving a state government and a corporate entity was a 'document-heavy dispute' where the relevant evidence was reduced to writing. Given that this was a 'document-heavy dispute', in our view, the Court of Appeal was entitled to make its decision based on those contemporaneous documentary evidence produced by the plaintiff (see *Len Min Kong v United Malayan Banking Corp Bhd And Another Appeal* [1998] 2 MLJ 478, *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229).

[35] As mentioned earlier, the defendant terminated the agreements vide latter dated 18 March 1975. The letter clearly reads:

> I am directed to draw your attention that a breach of Clause 5(b) of the aforesaid Agreement was committed by your Company in that your Company failed to give priority to the logging in the development area of all utilisable and commercially valuable timber for the first phase within a period of not more than five years which period was subsequently extended to seven years. You would note that the expiry date of the first phase for your Company to complete lodging in the development areas was on 19th July, 1971. According to Clause 5(b), your Company was to complete logging during this phase of not less than 20,000 acres whereas your Company's performance so far is not even one-third of this acreage.
>
> 2. In view of the above breach, the State Government hereby exercises its right reserved under Clause 5(b) (i) to terminate the said Agreement with effect from the

A date of this letter. The State Government, therefore, considers no longer bound by the Agreement without however prejudice to its rights to claim for any damages arising out of this breach.

3. In addition to the breach by your Company of the obligations under Clause 5(b), there are also other breaches committed by your Company in particular obligations under clause 5(f) and (g) and Clause 1(g) (i) of the Agreement.

B

[36] By letter dated 21 April 1975, the plaintiff merely stated that it did not accept the validity of the termination and threatened to take relevant action. The material part of the letter reads:

C

Your letter of the 18th March 1975 addressed to the General Manager, Timbermine Development Corporation Ltd. has been handed to us with instructions to reply thereto.

In the light of the events that have occurred our clients do not accept the validity of your purported exercise of the provisions of Clause 5(b)(1) of the above agreement and they will take all such action as they shall be advised to protect their interests therein.

D

E **[37]** The plaintiff challenged the termination vide the above letter of 21 April 1975. Despite its intention of taking action, the plaintiff only filed the action in 2004.

[38] From the documents tendered at trial, it can be seen that there was no written communication between the plaintiff and the defendant for over ten years from 1977–1989. From evidence adduced the plaintiff had not done anything to enforce any right arising from any alleged wrongful termination from 1977 (after the letter from the defendant dated 28 July 1977 expressing that the state government is in the process of studying future developments((exh P21)) right until its letter dated 14 November 1989 to the defendant (exh P22). The plaintiff further failed to do anything from 1989 until it sent a letter 24 January 1995 (exh P23) and remained silent from 1996 until 25 June 2002 (exh P25A).

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G

H

[39] It is plain for us to see from a reading of the record of appeal that none of the correspondence exchanged between the plaintiff and the defendant up to 2004 demonstrated any form of admission on the part of the defendant and there was no negotiation that could be said to have bound the defendant in any way. Those letters only demonstrate disinterest and a lack of commitment on the part of the defendant. Based on the evidence, we are in complete agreement with the finding of the Court of Appeal that the defendant did not at any time either by way of representation or conduct unmistakably cause the plaintiff to believe that the defendant would not rely on the defence of limitation so long

I

as settlement negotiations were ongoing. In our view the stand taken by the plaintiff not to commence legal proceedings against the defendant before 2004 was of the plaintiff's choice.

[40] We would place our emphasis here that the Court of Appeal was rightly satisfied that s 29 of the Limitation Act 1953, relating to fraud, did not apply because there was nothing to demonstrate any indication, representation or conduct by the defendant that it would not rely on the defence of limitation during the negotiations in the 1970's and 1980's, nor anything to demonstrate that there was any fraudulent concealment.

[41] Irrespective of any negotiations, the plaintiff was aware that its time was running out but chose not to enforce the rights it believed it had. As stated by *Chitty on Contracts* (30th Ed) Vol 1 (paras 28–111):

> The fact that the parties have entered into negotiations for the settlement of their dispute will not, without more, suspend or otherwise affect the running of time or prevent the defendant from relying on the statute, even though the limitation period may expire before the negotiations are concluded. But in *Wright v John Bagnall & Sons Ltd*, and again in *Lubovsky v Snelling*, the claimant had an action in tort against the defendant which was subject to a very short imitation period. Before the period had expired, negotiations took place between representatives of the parties in the course of which liability was admitted subject to the question of quantum. Soon after the period expired the claimant issued a writ and the defendant pleaded the statute. In both cases it was held that the action succeeded: in the former case because the defendant was estopped from pleading the statute, and in the latter case because there was an implied agreement not to plead the statute. Previously, the safest course for a claimant to pursue was to issue a writ within the period but not to serve it until the negotiations broke down. This practice may now be of limited utility, since a claim form must be served within four months, unless the court makes an order extending the period. But a claimant may commence legal proceedings to protect its position and then apply for a stay of proceedings to allow for settlement of the case.

[42] In the present case the fact that limited negotiations took place before 1977 did not prevent limitation from continuing to run and expiring. The correspondence up to 2004 clearly showed that at all times there was no admission of liability on the part of the defendant, therefore the plaintiff is clearly time barred to make any claim against the defendant. Unlike the cases cited by the learned authors of *Chitty on Contract* where limitation could not be pleaded because there was an admission of liability, in the present case there was never any admission of liability by the defendant.

[43] On the limitation issue, we conclude by saying that time commenced to run for the purposes of the 1953 Act from 18 March 1975. Therefore, the plaintiff should have filed its claim on or before 17 March 1981 to preclude the

same from being defeated by the defence of limitation. Since the plaintiff filed this claim on 8 October 2004, it is barred by limitation.

Whether any settlement agreement came into existence

[44] From this point on, we shall address the issue of whether a settlement agreement came into existence based on the minutes of the meeting of 17 June 1975. The main thrust of the contention of learned counsel for the plaintiff was that at the meeting parties reached consensus on a mode of settling the entire dispute by agreeing to form a joint venture company which would continue to carry out logging in the specified area and that equity in the joint venture company was to be split between the parties whereby the defendant was to be given a 70% stake and the plaintiff was to be given a 30% stake. This consensus was referred to by learned counsel as the 'settlement agreement'. It was further contended that the settlement agreement was subsequently varied by the parties sometime in November 1976 to include the following additional terms. First, the defendant to pay the sum of RM3.5m as a gesture of goodwill to the plaintiff and secondly, the plaintiff was not to commence legal action against the defendant to enforce its rights in the specified area.

[45] On the settlement agreement issue, the Court of Appeal held:

> In our judgment, there was never an unconditional commitment on the part of the appellant to set up a joint venture company along the lines pleaded by the respondent, certainly not in the minutes of the meeting of 17 June 1975 or at all. In any event for such an agreement to be enforceable, in law, it is essential that the parties reach agreement on the terms upon which the joint venture is to be formed and was to operate as a company.

[46] We are in full agreement with the Court of Appeal that as no evidence was produced by the plaintiff, we conclude that no settlement agreement was ever reached between the parties. It is trite that any potential agreement binding the parties being subject to contract require the execution of a formal agreement containing the terms (see *Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang* [2006] 4 MLJ 656; [2006] 2 CLJ 1040, *Nicolene Ltd v Simmonds* [1953] 1 All ER 822 and *BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another* [2010] EWHC 86 (TCC)).

[47] It is quite plain to us that the meeting of 17 June 1975 chaired by Tengku Ahmad Rithauddeen, which was held on a without prejudice basis was not based on legal relationship arising from the termination of the agreements. This was clearly stated in the minutes of meeting as follows:

> The Hon'ble Chairman further stated that the discussion should be regarded without prejudice to any legal proceedings between the Government of Kelantan

> and the Timbermine. That discussion also had no concern with legality of the conditions in the previous agreement between the Government of Kelantan and the Syarikat Timbermine. The object of the meeting was merely to discuss the possibility of setting up joint-venture between the Government of Kelantan's Agency and the Syarikat Timbermine with a view to operate timber industry in the concession area held by Syarikat Timbermine. The State Government of Kelantan has agreed to form joint-venture with Syarikat Timbermine on the basis of 70% of the shares to be given to the Government of Kelantan and 30% would be held by Syarikat Timbermine. To implement the joint-venture, a new company should be formed. Other conditions concerning the joint-venture would be discussed further between both parties. The Hon'ble Chairman further asked for the views of the representatives of Syarikat Timbermine regarding the above proposal of the State Government of Kelantan.

[48] When one carefully looks at the minutes of the meeting, what stands out is that it expressly states 'the object of the meeting was merely to discuss the possibility of setting up joint-venture' between the parties. The language in the said minutes does not admit any ambiguity. It is entirely inconsistent and is diametrically opposed to the contention of learned counsel for the plaintiff and the learned High Court judge's decision that a settlement agreement was concluded between the plaintiff and the defendant. Significantly, as we have indicated earlier, subsequent to the meeting of 17 June 1975, in a letter dated 16 October 1975 to the defendant, the plaintiff outlined the proposed terms of the joint venture company (makeup, directorship, capital) but the evidence showed that the defendant never responded. In this regard, we wholly agree with what the Court of Appeal said on the plaintiff's proposal as encapsulated in the letter dated 16 October 1975:

> The respondent quite clearly recognised the need for such details to be agreed upon and hence the letter of 16 October 1975 outlining the details of the makeup of the joint venture company in terms of directorships, capital etc. However, the fact of the matter is that the appellant never reverted to the respondent on its proposals and less still agreed to the proposals contained in the respondent's letter of 16 October 1975 so as to bring about a binding legal contract (see the case of *JH Milner & Sons v Percy Bilton Ltd* [1966] 2 All ER 894 at page 898 for the distinction between an 'understanding' and a 'binding legal contract').

[49] It is pertinent to note that the Court of Appeal cited the English case of *J H Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894, where a solicitor wrote to a prospective client with whom there was not yet any legal arrangement: 'may we please take this opportunity of placing on record the understanding that all the legal work of and incidental to the completion of the development and the grant of the leases, shall be carried out by us'. When the solicitor attempted to argue that this constituted a binding and enforceable agreement that court held that this merely amounted to:

> ... confirmation of a present intention on his part to instruct Mr. Lyon to do this legal work as and when it arose. To seek to hold the defendants to more than that is, in my view, not legally sound, and it is quite unnecessary to consider whether it would be ethically laudable or desirable to do so.

[50] Likewise in the present case, in our view, the contemporaneous documentary evidence adduced only fortifies that the defendant was taking into consideration the possibility of entering into a joint venture agreement, not that a formal agreement had been made. It was still merely considering the possibility of entering into a joint venture agreement. The first is the letter of Tengku Razaleigh Hamzah as the Minister of Finance dated 28 September 1976 to the Menteri Besar of Kelantan. The material part of the letter reads:

> 3. Dalam rundingan singkat itu satu kata sepakat telah tercapai di antara wakil-wakil Syarikat tersebut dengan saya dalam mana pihak wakil-wakil Syarikat tersebut telah sanggup menerima RM3.5 juta yang ditawarkan oleh Kerajaan Negeri Kelantan sebagai bayaran yang disifatkan sebagai 'as a gesture of goodwill'. Bayaran ini adalah atas kehendak Kerajaan Negeri Kelantan kerana hendak memupuk pertalian yang baik dengan Syarikat tersebut yang telah selama ini telah menjalankan usaha perkayuan di Negeri Kelantan. Dan ianya tidak ada bersangkut paut dengan tindakan yang telah dibuat oleh Kerajaan Negeri Kelantan membatalkan perjanjian 'concession' di Ulu Kelantan dan juga dibuat 'without prejudice' kepada tindakan yang telah pun dijalankan oleh Kerajaan Negeri.
>
> 4. Dengan penyelesaian yang tercapai di antara Syarikat Kemajuan Timbermine Sdn Bhd dengan Kelantan itu make berertilah bahawa Kerajaan Negeri Kelantan boleh mengadakan rundingan dengan Syarikat tersebut atas cadangan hendak mengadakan usaha bersama bagi menjalankan rancangan perkayuan yang difikirkan munasabah dan berfaedah kepada rakyat dan Negeri Kelantan pada suatu ketika yang difikirkan sesuai bagi semua pihak.

[51] The Court of Appeal made an important observation on Tengku Razaleigh Hamzah's letter dated 28 September 1976 letter, which we respectfully agree and reproduced as follows:

> At the outset, we wish to highlight the fact that Yang Berhormat Tengku Razaleigh Hamzah expressly acknowledged that his letter of 28 September 1976 was without prejudice to the appellant's rights under the agreements arising from the termination of the agreements. A careful examination of his letter reveals that he made the following representations/proposals to the appellant. First that the respondent will not be issuing any legal proceedings against the appellant arising from the termination of the agreements. Secondly, that the respondent be paid the sum of RM3.5m by way of goodwill money. Thirdly, that the appellant include the respondent's assets in the original concession area as its contribution to the capital of the joint venture company to be formed together with the appellant.

[52] The second is the letter from YAB Dato' Haji Muhammad Nasir as the Menteri Besar of Kelantan to the plaintiff dated 28 November 1976. The

relevant portion of the letter reads:

> 2. ... maka sukacita saya menyatakan di sini bahawa pihak Kerajaan Negeri bersetuju dengan cadangan-cadangan penyelesaian bagaimana yang di kemukakan di dalam surat itu.
>
> 3. Langkah-langkah sedang diambil sekarang untuk mengadakan wang berjumlah RM3.5juta itu dan akan dibuat bayaran kepada Syarikat Dato' secepat mungkin.
>
> 4. Suka juga dipertegaskan disini bahawa persetujuan yang akan dibuat ini tidak memperasangkakan akan yang tindakan yang telah diambil oleh Kerajaan Negeri dan seterusnya juga bagi sebarang perkiraan yang akan dilakukan kemudian kelak terhadap usaha-usaha yang dirancangkan bagi pembangunan di kawasan ini.

[53] From the above contemporaneous letters, it can be seen that the without prejudice payment of RM3.5m was actually a gesture of goodwill from the defendant to the plaintiff for the development in Kelantan that the plaintiff had undertaken and was a result of the mediation efforts of high-ranking political figures, and was not related to the termination of the agreements or the execution of a settlement agreement.

[54] The third is a letter from Dato' Nik Sulaiman as the Kelantan's State Secretary to the plaintiff dated 28 July 1977. The pertinent part of the letter states as follows:

> I am directed to refer to your letter NH/DIM/3008/SKTSB dated 17th June, 1977 and to express the State Government's gratitude for your cooperation towards an amicable settlement on the matter.
>
> 2. The State Government is still in the process of studying future developments and other related industries in the area in question.

[55] From the above, in our view, the contemporaneous documentary evidence compellingly points to this: there was never an unconditional commitment by the defendant to enter into any form of settlement agreement with the plaintiff. We have tested the plaintiff's position against the contemporaneous documents and we find that there is no evidence that supports the plaintiff's contention of the existence of any settlement agreement between parties. Given that over the course of more than twenty years no such agreement was ever concluded, it is plain that there was never a very strong intention and no final decision was made nor was any definitive action taken to establish such a joint venture between the parties. Therefore, one thing is clear. The evidence led by the plaintiff failed to establish the existence of a legally enforceable settlement agreement given that the documentary evidence showed a lack of the requisite components of a binding contract between the plaintiff and the defendant. There could not be a settlement agreement because

there was indeed no concluded contract between the parties. The Court of Appeal was for that reason correct to conclude that no settlement agreement ever came into existence.

Whether the plaintiff has met the burden of proof where the defendant elected not to call any witnesses

[56] Learned counsel for the plaintiff argued that the Court of Appeal ought not to disturb findings of fact by the High Court. He added that the Court of Appeal had gone beyond its appellate powers in this case as the reversal and substitutions of the findings of facts was wholly unjustified and therefore the judgment of the Court of Appeal should therefore be set aside. It was further submitted that the evidence led by the plaintiff must be assumed to be true when the defendant elected not to call any witnesses. On these submissions we have two observations to make. The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785). And the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v EI Du Pont De Nemours And Co* [2011] MLJU 1135; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (see *The Fordeco Nos 12 And 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449, *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd And Other Appeals* [2004] 4 MLJ 105 and *Teh Swee Lip v Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. In this regard, in adopting the approach of the case of *Storey v Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in

law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[57] We therefore agree with the submission of learned counsel for the defendant to the effect that despite the fact the defendant did not call any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement. This crucial point was overlooked by the learned High Court judge. On the factual matrix of the case, it is patently clear that the plaintiff has not discharged the burden. On this basis, the Court of Appeal was in every respect justified in holding that the learned High Court judge was plainly wrong in making a ruling of law that the settlement agreement had come into existence based on the conduct of both parties. Indeed, the election by the defendant to call no evidence at trial does not preclude the reversal of a plainly wrong findings of the learned High Court judge by the Court of Appeal.

Whether adverse inferences to be drawn against the defendant from the failure to call any witnesses and to adduce evidence

[58] Learned counsel for the plaintiff also argued that the failure to adduce evidence and call any witnesses would, in his words, 'attract all the usual debilitative factors including the drawing of adverse inferences'. The statutory basis for the drawing of an adverse inference is s 114(g) of the Evidence Act 1953 which provides that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. Adverse inference under that provision can be drawn if there is a withholding or suppression of evidence and not merely on account of failure to obtain evidence (see *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425 and *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). We do not detect any oblique motive on the part of the defendant in not producing any witnesses. In any event, such an inference would have been inappropriate in the context of the present case. The termination of the agreements took place around thirty years before the filing of the action. We have said earlier, as a commercial case, this was a document-heavy dispute where the pertinent evidence was reduced to writing. It would not be appropriate to draw the inference where there has been no deliberate withholding or suppression of evidence as all the relevant documents were in the plaintiff's possession. Besides, as rightly pointed out by learned counsel for the defendant, as the question of adverse inference was not raised by either party during the trial, the

learned High Court judge and the Court of Appeal did not make any finding of adverse inference. It is misplaced for the plaintiff to introduce the argument of an adverse inference being drawn at this late stage. Moreover, as regards to the non-calling of any witnesses by the defendant, the ratio in the case of *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585 at p 601 will be applicable in the present case. In that case, Siti Norma JCA (as Her Ladyship then was) in delivering the judgment of the Court of Appeal held that it would not be appropriate to draw an adverse inference where a defendant elects not to call any evidence unless the plaintiff has proven its case on a balance of probability. We adopt the principle of law as stated by the Court of Appeal in *Thong Foo Ching & Ors v Shigenori Ono*.

CONCLUSION

[59] In light of our findings and in the circumstances of this case, it is unnecessary for us to answer the question as framed. In consequence, this appeal must fail. We accordingly dismiss it with costs. We order the deposit to be refunded to the plaintiff.

Appeal dismissed.

Reported by Ashok Kumar